In the Court of Appeals of the State of Alaska

Arthur Augustine, Appellant, v. **State of Alaska,** Appellee.	Court of Appeals No. **A-12659** **Order** Reversing Judgement of Superior Court Date of Order: **4/12/2022**

Trial Court Case No. **4FA-12-00482CR**

Before: Allard, Chief Judge, Harbison, Judge, and Mannheimer, Senior Judge.[*]

Arthur J. Augustine was convicted of sexually abusing his two grand-daughters. The State's evidence against Augustine was based almost completely on out-of-court statements of the two children — statements that were given when the children were interviewed by a police investigator. These out-of-court statements were conveyed to the jury through video recordings of the interviews, as well as through the hearsay testimony of adults.

The trial judge admitted the children's recorded interviews under the provisions of Alaska Evidence Rule 801(d)(3). This evidence rule declares that the recorded pre-trial statement of a crime victim is exempted from the hearsay rule if the victim is under 16 years old, if the child is available for cross-examination at trial, and if the out-of-court statement was taken under circumstances that satisfy the eight criteria listed in subsections (A) through (H) of the evidence rule.

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[*] Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

Most of the eight criteria listed in Evidence Rule 801(d)(3) concern factual issues, such as whether the interview with the victim was conducted before the proceeding, and whether the victim's statement was recorded in a format that preserves both the audio and video components of the statement. But two of the criteria — (d)(3)(F) and (d)(3)(H) — explicitly require the trial judge to exercise judgement after evaluating the entirety of the circumstances surrounding the victim's statement.

Under subsection (d)(3)(F), the State must prove that "the taking of the statement as a whole was conducted in a manner that would avoid undue influence [on] the victim". And under subsection (d)(3)(H), the judge must additionally "determine that [the out-of-court statement] is sufficiently reliable and trustworthy and that the interests of justice are best served by admitting the recording [of the statement] into evidence."

In our first decision in this case, *Augustine v. State (I)*, 355 P.3d 573 (Alaska App. 2015), we concluded that the trial judge failed to hold the State to its burden of proof under subsection (d)(3)(F), and that the trial judge failed to fulfill his role as evidentiary gatekeeper under subsection (d)(3)(H). We therefore remanded Augustine's case to the superior court for reconsideration of whether the children's out-of-court statements should have been admitted.

The superior court reconsidered the matter and issued a decision on remand, again ruling that the children's out-of-court statements were properly admitted at Augustine's trial. But the superior court's explanation of its decision was so terse and conclusory that it was impossible for this Court to meaningfully review the court's ruling. We therefore remanded this case to the superior court a second time. *Augustine v. State* (*II*), 469 P.3d 425 (Alaska App. 2020).

Pursuant to our remand, the superior court considered the admissibility of the children's out-court-statements a third time, and again the superior court ruled that these statements were admissible under Evidence Rule 801(d)(3). However, a major aspect of the superior court's analysis was the court's finding that the expert witness who testified for the State, Lori Markkanen, was more "credible" than the expert witness who testified for the defense, Dr. John Yuille.

In context, the judge's use of the word "credible" does not appear to be a finding that one of these witnesses was more truthful than the other; rather, the judge found that Markkanen's testimony was more persuasive than Yuille's testimony. But the judge expressly stated that his finding of persuasiveness was based, not on the testimony that Markkanen and Yuille gave in Augustine's case, but instead on the testimony that these two witnesses gave in unrelated child-in-need-of-aid proceedings.

This was improper. The judge was required to set aside any opinion he may have formed in the unrelated proceedings about the relative credibility of these two witnesses, or the weight that should be given to their respective testimony, and the judge should have based his ruling solely on the evidence that was presented in Augustine's case.

Accordingly, in March 2021 this Court remanded this case to the superior court for a third time, directing the court to reconsider the question of whether the children's police interviews were admissible at Augustine's trial under Evidence Rule 801(d)(3).

Pursuant to this remand, the superior court considered the admissibility of the children's statements for a fourth time, and the superior court again ruled that the children's interviews were properly admitted under Evidence Rule 801(d)(3). However, the superior court again failed to articulate sufficient findings to justify its ruling under Evidence Rule 801(d)(3) as interpreted in *Augustine I*, 355 P.3d at 581–87.

We accordingly conclude that it was error for the superior court to admit evidence of the children's out-of-court statements at Augustine's trial. And because those out-of-court statements comprised almost the entirety of the State's case, we conclude that the improper admission of those out-of-court statements requires the reversal of Augustine's convictions.

The judgement of the superior court is REVERSED.

Entered at the direction of the Court.

Judge ALLARD, concurring.

I write separately to explain in more detail why I conclude that another remand would be pointless and reversal is required in this case.

An important feature of this case that distinguishes it from other cases is that, at trial, the children did not provide any substantive testimony. Instead, Augustine's convictions were based almost exclusively on video-recorded out-of-court statements made by the two children during police interviews that were admitted under Evidence Rule 801(d)(3). Augustine objected to the admission of these out-of-court statements,

contending that they failed to satisfy the statutory criteria for admissibility. That is, he argued that the State had failed to prove that "the taking of the statement[s] as a whole was conducted in a manner that would avoid undue influence," and that the statements were "sufficiently reliable and trustworthy and that the interests of justice are best served by admitting the recording[s] into evidence."[1]

Augustine's challenge to the admissibility of these statements was based primarily on the conclusions drawn by Dr. John Yuille, a forensic psychologist and expert on child forensic interview protocols. Dr. Yuille criticized several aspects of the police interviews. Dr. Yuille noted that the interviewer, Detective Yvonne Howell, allowed the children to draw throughout the interview, which Dr. Yuille stated was "distracting" and "interferes with effective interviewing." Dr. Yuille also noted that Howell asked the children "multiple-choice" questions (*i.e.*, questions to which Howell herself suggested two or more potential answers), which can cause a child to guess one of the suggested alternatives, even if they themselves do not remember the answer. In addition, Dr. Yuille noted that Howell asked the children leading questions, which (according to Dr. Yuille) made it "impossible to tell" whether the children's answers were reliable.

Dr. Yuille concluded that Howell's interviewing techniques significantly undermined the reliability of the statements that the children made during the interviews. He pointed out, for example, that one of the children, T.Y., gave inconsistent descriptions of the same event depending on how the question was phrased. When Howell asked

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[1] Alaska R. Evid. 801(d)(3)(F), (H)

T.Y., "Did you go?", T.Y. replied, "Yes." But when Howell then asked, "Did he make you stay?", T.Y. responded that Augustine made her stay.

Dr. Yuille summed up his evaluation of the interviews with the following observations:

> Four poor quality interviews were conducted with these two children. No attempt was made to determine what may or may not have happened in this case: the interviews were intended to prove that the suspect had offended against these children. The biased interviews were characterized by leading questions and multiple choice questions. Little information was obtained from the children[,] and what was obtained was of questionable reliability. Proper, effective, non-leading interviews of these children are needed to determine what, if anything, may have happened in this case. At present, an assessment of the credibility of the allegations is impossible.

In response to Dr. Yuille's concerns, the trial court simply concluded that these were issues for the jury, without any further analysis.

In Augustine's initial appeal, *Augustine I*, this Court explained that the trial court's approach to this problem — the court's decision that it was up to the jury to evaluate all of the potential ways in which the children's statements might be unreliable — was an abdication of the court's judicial duty to determine, before admitting the evidence, whether the State had satisfied the foundational requirements specified in Evidence Rule 801(d)(3).[2] We therefore remanded Augustine's case to the superior

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[2] *Augustine v. State (I)*, 355 P.3d 573, 576 (Alaska App. 2015).

court, directing the court to determine whether the State had satisfied the foundational requirements of Evidence Rule 801(d)(3).[3]

When we described Dr. Yuille's report in *Augustine I*, we made it clear that our description was "not intended as an endorsement of Dr. Yuille's analytical approach or his conclusions," but was only intended to "demonstrate that the defense offered substantive reasons to doubt the reliability of M.Y.'s and T.Y.'s statements."[4] Implicit in this clarification was an acknowledgment that it is the trial judge, not this Court, who is tasked in the first instance with reviewing the proposed evidence, balancing the various factors enumerated in Evidence Rule 801(d)(3), and deciding whether to admit the out-of-court statements.

In response to our remand in *Augustine I*, the trial court ruled that the State had satisfied the foundational requirements specified in Evidence Rule 801(d)(3). But as we explained in *Augustine II*, the trial court failed to provide any substantive explanation of its ruling; the court simply declared that it did not find Dr. Yuille's concerns "persuasive."[5]

We held in *Augustine II* that this conclusory ruling was insufficient because it failed to provide this Court with "a clear understanding of the basis of the trial court's decision" — that is, the trial court failed to provide an explanation that would have

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[3] *Id.*

[4] *Id.* at 578.

[5] *Augustine v. State (II)*, 469 P.3d 425, 430 (Alaska App. 2020).

enabled us "to determine the ground on which the trial court reached its decision."[6] We therefore provided explicit, lengthy instructions to the trial court, explaining what issues the trial court should address on remand.[7]

Broadly speaking, we instructed the court to address: (1) whether allowing the children to draw during the interviews was distracting and undermined the reliability of the recorded statements; (2) whether the interviewer's repeated use of leading and multiple-choice questions undermined the reliability of the recorded statements; and (3) why the judge credited the testimony of Markkanen, the State's expert on the subject of child interviews, over the testimony of Dr. Yuille, who was ostensibly more qualified on this subject.[8]

We again declined to endorse Dr. Yuille's approach or his conclusions, as that was not our role as an appellate court. But we did explain that if the trial court decided to reject the concerns raised by Dr. Yuille, the court needed to provide a clear explanation as to why the court was doing so.[9]

In its initial response to our remand in *Augustine II*, the trial court explained that it found Markkanen's testimony more persuasive based, not on the testimony Markkanen and Dr. Yuille provided in Augustine's case, but instead on the testimony that these witnesses had previously given in unrelated child-in-need-of-aid proceedings.

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[6] *Id.* (quoting *McKitrick v. Pub. Emps. Ret. Sys.*, 284 P.3d 832, 839 (Alaska 2012)).

[7] *Id.* at 431-33.

[8] *Id.*

[9] *Id.*

This was improper, so we again remanded for further findings, instructing the trial court to base its ruling solely on the evidence presented in Augustine's case.

That brings us to where we are today. The trial court has again attempted to address the questions we asked in *Augustine II*. But, as explained below, the court's answers are either not supported by the record or are insufficiently explained to allow meaningful appellate review. And because this appeal has gone on long enough, I no longer think it is appropriate for this Court to continue remanding for further findings. Rather, the trial court's consistent inability to justify its ruling gives rise to the unavoidable inference that the ruling cannot be justified — and that the children's video-recorded out-of-court statements were improperly admitted.

Whether allowing the children to draw was distracting

With respect to whether allowing the children to draw was distracting, we noted in *Augustine II* that Dr. Yuille testified that allowing children to draw throughout the forensic interviews is a distracting influence that interferes with effective interviewing.[10] We acknowledged that the trial court apparently found this assertion unpersuasive, but it never explained why. We therefore presented a series of possible conclusions the trial court could have reached (*e.g.*, "Did the judge conclude that allowing the children to draw during the interviews could potentially have been

[10] *Id.*

distracting, but that it was not distracting in this case?"), and we instructed the trial court to state which conclusion it reached and to explain its reasoning.[11]

On remand, the trial court explained that it was persuaded by Markkanen's expert testimony that allowing children to draw during such interviews is a widely accepted technique in child interviews across the country, and the court further concluded that "the children [in this case] were not distracted by drawing in an unreliable or problematic way."

The trial court's conclusions, however, are not supported by Markkanen's testimony. During her direct examination, Markkanen was asked to respond to Dr. Yuille's assertion that, as paraphrased by the prosecutor, "no accepted [child interview] protocol allows [drawing]." Markkanen stated that she disagreed with this assertion. But when Markkanen was pressed to give examples of situations where it was acceptable to allow a child to draw during police questioning, Markkanen provided only examples of having children make a drawing for a limited, instrumental purpose, such as illustrating what they were describing in their statement (which Dr. Yuille never claimed was inappropriate), or allowing a child to draw as a tool for children dealing with trauma (which Dr. Yuille specifically testified was acceptable when necessary). Markkanen failed to provide any examples of child interview protocols that encourage the kind of drawing that occurred in this case: allowing the child to draw throughout the interview for no specific reason, and unrelated to the interview process.

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[11] *Id.*

In addition, a review of the videos of the interviews demonstrate that the children were, in fact, distracted by their drawing, and that this distraction interfered with their ability to provide a coherent narrative of what happened. For example, about twenty minutes into T.Y.'s interview, the following exchange occurred:

> *Det. Howell*: How many times do you think that — that he made you do that?
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> *T.Y.*: [Drawing] Maybe one thousand times?
>
> *Howell*: One thousand times? So, more than one time?
>
> *T.Y.*: Yeah. [Pulling a new marker out of a box] What's your favorite color?
>
> *Howell*: My favorite color is pink or red.
>
> *T.Y.*: [Continuing to draw] My favorite color is purple.

There are numerous other examples of similar exchanges throughout the interviews. It is obvious, upon viewing the videos, that the children's drawing *was* distracting, and that it interfered with their ability to answer the interviewer's questions and provide a clear narrative of what happened. Neither of the trial court's conclusions — that this type of drawing is appropriate, or that, in any event, it was not problematic in this case — are supported by the record.

Whether the leading and multiple-choice questions undermined the reliability of the recorded statements

The second issue we asked the superior court to specifically address in

Augustine II was the interviewer's use of multiple-choice and leading questions.[12] Dr. Yuille testified that those interviewing techniques undermined the reliability of the children's statements. We again presented a series of possible conclusions the trial court might have reached (*e.g.*, "Did the trial judge conclude, as a general matter, that Dr. Yuille was wrong when he asserted that multiple-choice and leading questions can undermine the reliability of children's statements during a forensic interview?"), and we instructed the trial court to state which conclusion it reached and to explain its reasoning.[13] We also noted that Augustine had pointed to a number of specific examples of multiple-choice and leading questions, and we instructed the trial court to address at least some of the most striking examples in its ruling.

In response to our instructions, the trial court noted that both Dr. Yuille and Markkanen agreed that multiple-choice and leading questions were sometimes necessary under the "funnel technique," where the interviewer opens with general questions and then slowly narrows in on more specific topics. The court acknowledged that "there were a few suggestive questions, such as 'your mom and dad are worried about you and whether you are safe,'" but the court found "that the questions did not undermine the entirety of the interviews or otherwise make them untrustworthy or unreliable." The trial court did not otherwise address any specific examples.

The trial court also acknowledged that the interviewer used some multiple-choice questions, but the court noted that both Dr. Yuille and Markkanen testified that multiple choice questions were appropriate if they included an open-ended option (*e.g.*,

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[12] *Id.* at 431.

[13] *Id.*

"Did it happen in the bedroom, in the kitchen, or somewhere else?"). Again, the trial court did not discuss any specific examples, instead asserting in conclusory fashion that Howell's use of multiple-choice questions "did not undermine the credibility of the interviews."

Notably, on remand, Augustine filed a lengthy memorandum in the trial court, addressing, *inter alia*, numerous specific examples of suggestive, leading, and multiple-choice questions. Rather than address any of those examples, the trial court simply asserted, in sweeping fashion, that Howell's leading and multiple-choice questions "did not undermine the entirety of the interviews at all."

But a review of the videos demonstrates otherwise. At one point, for example, Howell asked M.Y. if Augustine's hand went inside her body or remained outside her body — a crucial fact for establishing the element of "sexual penetration" necessary to support a conviction for first-degree sexual abuse of a minor — and M.Y. simply responded "Yes" to both options.[14] And later, when Howell asked the other granddaughter, T.Y., whether Augustine put a finger inside her body, outside her body, or something else, T.Y. answered that Augustine put "a diaper" in her body, and then she said "food" went in her body. As Augustine has argued, T.Y.'s responses suggest that

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[14] Specifically, the exchange in full is reproduced below:

Det. Howell: Did his hand go on the inside of your tushy? On . . .
M.Y.: [Interrupting] Yes
Det. Howell: . . . the outside . . .
M.Y.: [Interrupting] Yes
Det. Howell: It went on the inside?
M.Y.: Uh-huh [affirmative]

T.Y. was inventing a story to fit Howell's theory that Augustine put something in her body.[15]

As a review of the videos demonstrates, these sorts of suggestive, leading, and multiple-choice questions were not isolated aspects of the interviews; they were the predominant mode of questioning adopted by Howell. The children never provided a free-flowing narrative of events: instead, they primarily responded to suggestive questioning by the interviewer.

Why the trial court credited Markkanen over Dr. Yuille

The third issue that we directed the trial court to address was why it credited the testimony of Markkanen over that of Dr. Yuille.[16] We pointed out that some of Markkanen's scientific claims appeared to lack support, and that Dr. Yuille was more qualified and had more experience in the field of child forensic interviews. We acknowledged that the trial court was not required to credit Dr. Yuille's testimony over Markkanen's simply because Dr. Yuille was more qualified and had more experience, but we emphasized that, if the court credited Markkanen over Dr. Yuille, the court should explain why it found Markkanen's testimony more persuasive despite her comparative lack of experience and qualifications.[17]

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[15] Indeed, in *Augustine I*, we concluded that this testimony was insufficient to support the conclusion that Augustine had sexually penetrated T.Y. and we reversed his conviction on that count.

[16] *Augustine II*, 469 P.3d at 432-33.

[17] As discussed above, the judge initially explained that he had credited Markkanen's testimony over Dr. Yuille's based on the testimony given by both witnesses in previous cases.

The trial court appeared to rely on two reasons for crediting Markkanen. First, the trial court appeared to credit Markkanen's testimony over Dr. Yuille's because, after watching the interviews itself, the trial court generally agreed with Markkanen's assessment, rather than Dr. Yuille's. The court stated, for example, that the videos did not support Dr. Yuille's conclusion that the drawing was distracting. But, as previously noted, the videos *do* support Dr. Yuille's conclusion that the drawing was distracting. The trial court also stated that, after watching the interviews, it disagreed with Dr. Yuille that Howell's leading and multiple-choice questions were inappropriate. But this opinion was stated in conclusory terms, without actually addressing the specific examples of seemingly inappropriate questions that we directed the court to address in *Augustine II*.

The only other reason offered by the trial court for crediting Markkanen's testimony over Dr. Yuille's was that at least one of the children "had previously made a statement that was consistent with her grandfather touching her." The court concluded that this fact supported Markkanen's view of the matter and undermined Dr. Yuille's position that the children's interview statements were not sufficiently reliable and trustworthy.

The problem with the trial court's reasoning is that Evidence Rule 801(d)(3) requires a determination, under subsection (F), that "*the taking of the statement as a whole*" — that is, the entire interview process — "was conducted in a manner that would avoid undue influence [on the child]." Thus, although the fact that a child made a prior consistent statement might be potentially relevant to a determination under subsection

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In response to this explanation, we remanded again, explaining that it was inappropriate to rely on any evidence outside of that presented in this case.

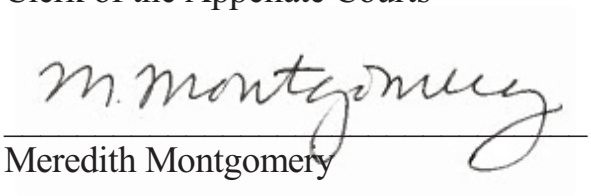
(H) as to whether the statement as a whole is sufficiently reliable and trustworthy, a child's prior consistent statement is irrelevant to a determination under subsection (F) as to whether the interview as a whole was *conducted* in a way that would avoid undue influence. And because the testimony of both Markkanen and Dr. Yuille focused primarily on how the interview was conducted, rather than on whether additional circumstances supported the truth of the underlying accusations, the trial court's reasoning on this point fails to explain its reliance on Markkanen's testimony over Dr. Yuille's.

Conclusion

Over the course of this litigation, we have repeatedly remanded this case to the superior court to provide specific findings as to why the court believed that the foundational requirements of Evidence Rule 801(d)(3) were met. In response, the court has provided only general conclusory statements that are either unsupported by the record or are insufficiently explained to allow meaningful appellate review. It has therefore become apparent that the trial court is unable to adequately explain and justify its original ruling. In my view, this gives rise to the unavoidable inference that the ruling cannot be justified, and that the trial court abused its discretion when it admitted the children's out-of-court statements under Evidence Rule 801(d)(3) over Augustine's objection. Such an error might be harmless in the context of another case where there was other evidence or where the out-of-court statements might have been admissible on other grounds (*e.g.*, as prior inconsistent statements). But, as already mentioned, the children did not provide any substantive testimony at Augustine's trial, and Augustine's

convictions rest almost entirely on these out-of-court statements. I therefore concur with the Court's order reversing Augustine's convictions and remanding his case to the superior court for a new trial.

Clerk of the Appellate Courts



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cc: Presiding Judge - Fourth Judicial District
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